NMFOG
New Mexico Foundation for Open Government

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July 29, 2011

Barbara Gudwin
President
Santa Fe Public Schools Board of Education

Via email to bgudwin@sfps.info

Dear Ms. Gudwin,

After reading recent news articles and reviewing video of the School Board's June 21 meeting, I felt it was important to raise concerns about the Board's 'ground rules' for live public comment. I do not doubt that you and your fellow Board members work extremely hard and are trying to act conscientiously in the best interest of the District and its students; I certainly appreciate the pressure and criticism that you face, from all sides. FOG's mission is to help educate the public about open government and First Amendment rights, and I hope my perspective will prove helpful.

I am concerned that the Board of Education's practice regarding public comment conflates two separate issues – on one hand, the Board's prerogative to discuss limited personnel matters in public or private. And on the other hand, the Board's ability (or lack thereof) to censor public comment at its meetings.

The first issue is governed by the Open Meetings Act or by internal Board regulations. As you well know, the Open Meetings Act allows the Board to discuss limited personnel matters behind closed doors. Similarly, the Inspection of Public Records Act allows the District to withhold "matters of opinion in personnel files" from public inspection. These discussions and personnel documents are not strictly confidential – that is, disclosing them is not a civil infraction or crime, the way that disclosing Crime Stoppers information or sharing motor-vehicle data with unauthorized persons is. Yet the law recognizes that such information may be withheld at the government's discretion.

Attorneys generally advise boards not to air limited personnel matters in a public meeting, and understandably so. The School District is an employer, and the Board of Education has access to sensitive personnel information – not to mention considerable power over individuals' reputations and livelihoods. A Board member who abuses that power by defaming someone's character in public poses a legal and community-relations risk to the District. Your code of ethics clearly reflects this reality and the Board's sensitivity to it.

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Once the Board has opened the floor for public comment, however, an entirely different set of rules and considerations kicks in. What is important here is not the Board's employer/employee relationship with District staff, but rather its relationship with the public as an elected governmental body.

The First Amendment protects each citizen's right to come before you and speak about school district business. A citizen's statements and opinions may be inflammatory, unfounded or wildly unpopular. They may be based on rumor, falsehood, or leaked information that was never intended to become public. But that citizen has a right to speak and be heard. The First Amendment severely restricts the Board's ability to pick and choose what speech it will allow during a public forum. Here, the liability risk flips – the Board would not be held liable for what citizens say during public comment, whether about District employees or anyone else. But the Board could be held liable if it infringes on citizens' First Amendment rights. The enclosed article covers some of the practical realities of balancing First Amendment rights with the need to conduct business and maintain order. The following core principles are key:

- A government body wishing to regulate speech in a designated public forum must meet the highest level of court scrutiny. Regulations that survive such scrutiny typically limit only the time, place and manner of speech.[1]
- In a public forum, speech codes must not discriminate against speakers because of who they are or what their viewpoint is.[2]
- The First Amendment affords the highest level of protection to speech about matters of public concern.[3]

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[1] **See** *Int'l Soc'y for Krishna Consciousness v. Lee*, U.S. Supreme Court. (1991) "Under this approach, regulation of speech on government property that has traditionally been available for public expression is subject to the highest scrutiny. Such regulations survive only if they are narrowly drawn to achieve a compelling state interest. *Perry,* 460 U. S., at 45. The second category of public property is the designated public forum, whether of a limited or unlimited character – property that the State has opened for expressive activity by part or all of the public. *Ibid.* Regulation of such property is subject to the same limitations as that governing a traditional public forum. *Id.,* at 46."

[2] **See** *Madison School District v. Wisconsin Employment Relations Commission*, U.S. Supreme Court (1976). "To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees. Whatever its duties as an employer, when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech. *See Police Dept. of Chicago v. Mosley,* 408 U. S. 92, 408 U. S. 96 (1972)."

[3] **See** *Snyder v. Phelps*, U.S. Supreme Court (2011). "That is because 'speech concerning public affairs is more than self-expression; it is the essence of self-government.' *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75 (1964). Accordingly, 'speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.' *Connick* v. *Myers*, 461 U. S. 138, 145 (1983) (internal quotation marks omitted) … Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community, *Connick*, *supra,* at 146, or when it 'is a subject of legitimate news interest;

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There are a few distinct problems with a ground rule that allows citizens to speak about any topic, "with the exception of personnel issues."

1. **It is too vague**. Everything that happens in the District is done by personnel. So where do personnel issues begin and end? Perhaps the Board is referring to "limited personnel matters," as defined in the Open Meetings Act. (This is itself problematic, as I will discuss below.) But without further clarification, "personnel issues" is a vague category that might balloon to include budget cuts that affect staffing levels, criticism of a department that is under new management, and so on. If the Board has a specific, narrow target in mind, that target should be stated in the rule, clearly and plainly. Otherwise, the rule threatens to swallow all public comment on District business. Ms. Moses' complaint is a good example of this, since it involves a matter of substantial public concern which goes far beyond "limited personnel matters." Her complaint is precisely the type of input which should be allowed in a public comment period, regardless of whether the complaint turns out to be false or true.

Furthermore, the enforcement of vague rules can be, or appear to be, capricious. During the June 21 public forum, before Ms. Moses was prohibited from finishing her comments, another citizen said that public statements made by the District's Special Education Director were "simply contrary to the reality that exists …"[4] Yet she was allowed to keep speaking. It is unclear why this comment was not considered an impermissible statement "directed at any employee of the district," yet Ms. Moses' comments were.[5]

This speaks to a danger inherent in vague rules. Would-be participants who cannot predict when they might be 'gaveled down' at a meeting may simply choose not to speak – an unacceptable chilling effect on free speech.

2. **It is informal**. The formal policies available on the District's website do not appear to contain any mention of public-forum ground rules. Under "How You Can Participate," the website simply states that "The Board requests that comments any non-personnel issue items be limited to three minutes." [sic] Citizens should not be expected to follow an informal, unwritten rule, particularly when it infringes on a fundamental constitutional right.

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that is, a subject of general interest and of value and concern to the public,' *San Diego*, *supra,* at 83–84. See *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 492–494 (1975); *Time, Inc.* v. *Hill*, 385 U. S. 374, 387– 388 (1967). The arguably 'inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.' *Rankin* v. *McPherson*, 483 U. S. 378, 387 (1987)."

[4] EZStream video of June 21 SFPS Board of Education meeting at 9 minutes.
http://www.ezstream.com/play/index.cfm?fuseaction=embstay&id=21189A03E1&dsplvl=brd

[5] EZStream video at 25 minutes.

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3. **It stifles public debate on important issues.** The public's job is to oversee the official acts of public officers and employees.[6] In light of that, it's unclear why the Board would want to eliminate public input related to "personnel issues," or even "limited personnel matters." It is not hard to imagine scenarios where such input would be helpful, even necessary. If the Board planned to discuss termination of a superintendent's contract, and members of the public wanted to rally to the superintendent's defense by sharing examples of his many good works, would their comments be prohibited? What purpose would that serve, other than leaving the Board with less information? Likewise, if community members are upset with the official actions of a public employee or officer, it is their right and duty to come before their elected representatives and voice that dissatisfaction. Their comments may be vehement, caustic, and even demonstrably false. But that is the price of having free, robust public debate about public affairs.

4. **It attempts to address employee privacy concerns through ineffective and unconstitutional means.** Deciding to censor all statements within a fairly broad category of speech, because of fears that an individual citizen might (a) slander a public official or (b) obtain and disclose non-public personnel information, is simply overkill. Moreover, these two types of unwanted speech still enjoy strong First Amendment protections. In case after case, the United States Supreme Court has set an extremely high bar for public officials seeking to prove a slander or libel claim related to the conduct of their official duties[7], and the Court has never upheld a governmental prior restraint on the publication of classified information, once leaked.[8] Instead, the Court has recognized that for speech to be truly free, we have to take the good, the bad and everything in between.

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[6] New Mexico Inspection of Public Records Act, 14-2-5 and New Mexico Open Meetings Act, 10-15-1A.

[7] **See** *Cantwell v. State of Connecticut*, U.S. Supreme Court (1940). "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." **See also** *New York Times Co v. Sullivan*, U.S. Supreme Court (1964). "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

[8] **See** *Near v. Minnesota*. U.S. Supreme Court (1931) "In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. The liberty deemed to be established was thus described by Blackstone: "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity." **See also** *New York Times Co. v. United States*, U.S. Supreme Court (1971). "'Any system of prior restraints of expression comes to this Court bearing a heavy

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If the Board is concerned that information which is exempt from public inspection or confidential by law is being improperly shared with outside parties, the Board can certainly implement internal Board policies or administrative procedures to prevent or punish the release of such information. (Keeping in mind that exemptions to public inspection are few and narrow under state public-records law.) Restricting the public's right to speak at public meetings is decidedly not the answer – such a policy violates First Amendment rights while failing to address the underlying privacy concern.

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Finally, the logical question is, what type of public-comment rule should the Board adopt to address its personnel concerns? My answer is "none." Boards, commissions and councils throughout the state and the nation are functioning effectively without any restriction on the public's ability to speak about personnel issues. Ground rules for public-comment periods are not uncommon, but they are designed to facilitate an efficient, productive public meeting – not protect the Board against liability or dissent. Common rules include time limits for individual speakers, rules against profanity or shouting, rules against interrupting the Board while it conducts its business, and so on. Some bodies limit public comment to topics on the agenda for the evening, and this is permissible. There is simply no need to adopt further regulation beyond these basic rules, particularly if the Board seeks to encourage public input.

Thank you for your attention to this matter, and please don't hesitate to contact me if you'd like to discuss this further, or if FOG can be of any assistance.

Sincerely,

Sarah Welsh
Executive Director

CC: Glenn Wikle, Linda Trujillo, Frank Montano, Steven Carrillo

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presumption against its constitutional validity.' *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70 (1963); *see also Near v. Minnesota,* 283 U.S. 697 (1931). The Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.' *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971)."